No. 10136.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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For the purpose of clarity, we wish to reply to Appellee's brief by discussing the statements and arguments contained in each portion thereof with reference to the title under which such statements and arguments appear in said brief.

We have presented in our Op. Br. an outline of the case and of the issues presented, and a full and fair statement of the evidence which is not challenged (Op. Br. pp. 2 to 47).

Appellee has entirely disregarded appellant's presentation of the facts and appellant's arguments upon the issue of the insufficiency of the evidence to support the verdict.

In our Op. Br. under the caption "The Facts in Evidence" we presented in the chronology of occurrence and subject matter a full and fair statement of all of the facts in evidence. This statement in no particular has been challenged by the appellee. We regret we find it necessary to challenge the verity of many of the appellee's statements as to the facts. Some of these statements of fact are diametrically opposed to the record in particulars that relate not only to our contentions that the evidence was insufficient but are of fundamental importance to other points raised in our brief.

Statement of Facts.

As we have seen, the Indictment charged only two false representations, *i. e.*, (a) that the First Security would invest only upon securities or properties approved as legal investments, and (b) represented the First Security was organized for the purpose of and actively engaged in the liquidation of the assets received by it from the Railway Mutual. We have asserted that there was not a scintilla of evidence that any representation (a) above was made to anyone (and in fact there was not). At page 87 of his brief appellee states "an examination of the record discloses at page 295, that plaintiff's Exhibit 131 'Copy of Plan, Agreement and Declaration of Trust for the Reorganization of the Railway Mutual Building and Loan Association,' contains the following language:

> 'Method of Reorganization * * * the objects and purposes of the corporation being to loan or to advance money and to take as security therefor se-

curities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California, and to operate a general savings and mortgage business.' "

Exhibit 131 does not appear at page 295 of the record but appears in full at page 324 to 330. Likewise the above quotation does not appear in Exhibit 131. The cited language at page 295 comes from the document entitled "Copy of Plan, Agreement and Declaration of Trust for the Reorganization of the Railway Mutual Building & Loan Association" attached to the application of the First Security for a permit to issue its securities and is from the files of the official records of the Corporation Commissioner of the State of California [R. 93]. The defendants stipulated that Exhibit 9 could go in evidence [R. 166] and portions of this file were read in evidence at pages 168 to 194, 210-213, 291-314; the same quotation from Exhibit 9 (the Corporation Commissioner's file) mistakenly cited by appellee as appearing at page 295 of the record as a part of Exhibit 131 was also read into the record as part of Exhibit 9 at page 193 of the record. Exhibit 131 is referred to in our Op. Br. at page 13 as a brochure sent out by the Reorganization Committee under date of December 5, 1931. This was the initial document to the security holders of the Railway Mutual. In that exhibit it is recited that "original and duplicate copies of the Plan and Agreement are on file for inspection" at the Railway Mutual and headquar-

ters of the Reorganization Committee [R. 324-330]; there was no evidence that any one ever read or examined the same. We reiterate that neither in this initial document to the security holders of the Railway Mutual or any communication thereafter, either written or oral, was any reference made that the Plan and Agreement of reorganization stated the purpose of the First Security to be one of "loaning or advancing money and to take as security therefore securities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks," etc. Obviously this grievous misstatement of a cardinal fact could only be made by one not participating in the trial and who lacked familiarity with such a large record.

Again, at page 30, appellee without any record support mistakenly asserts that the defendants were "* * * flaunting to high heaven its original promise to investors of Railway Mutual to loan their money only on security or property * * *" etc., concerning which there was not a scintilla of evidence.

Again at page 4 of his brief appellee referring to Exhibit 9 (Corporation Commissioner's file), states: "In that Plan appears the statement wherein and whereby it was represented to the security holders that the new company was being organized for the purpose to loan or advance money and to take as security therefor securities or properties which would be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California." As we have seen above no such representation

was ever communicated to any person either orally or in writing. The Plan itself contained many other provisions granting extremely broad powers; these powers were so broad that all that was done by the managers of the Plan and Agreement found authorization therein (Op. Br. 8-13). In support of the immediate above quoted portion of appellee's brief he cites record pages first, R. 291-295; this is from Exhibit 9 of the Corporation Commissioner's file, and contains the reference to the organization of the First Security regarding it loaning money on securities approved as legal investments. His next record reference is R. 314-315; this relates to the stipulation that the Plan and Agreement became effective but that it was not signed by the various depositors. The next record citation, R. 332, which is Exhibit 132, a letter under date of December 10, 1931, from the Reorganization Committee to the investor members of the Railway Mutual. This letter contains no such representation as asserted above by appellee that the First Security would loan money only upon approved legal investments. The next citation of the appellee is R. 335, and relates to Exhibit 133; this likewise contains no such representation. It is merely a recommendation by the full board of directors of the Railway Mutual, under date of December 15, 1931, to the members of the Railway Mutual to deposit their securities. The next record citation is R. 659; this refers to the testimony of the witness Tallamantes. This witness did not testify that she had read the Plan or that a representation as above had been made to her either orally or in writing. There is no evidence that the Plan itself

was ever circulated. Exhibit 131 was a brochure inviting investors to deposit their securities; but this exhibit contains no representations whatsoever concerning the nature and character of the proposed business purposes of the First Security being to loan money only on legal investments. This witness was asked:

"Q. Mrs. Tallamantes, as guardian of your son, Jack Winston, did you have submitted to you a plan from the reorganization committee of the First Security Deposit Corporation inviting you to accept their plan and exchange your securities, which you then held in the—

Mr. Adams: Objected to as leading and suggestive * * *

The Court: Well, it is a preliminary question.

Q. In which there was submitted to you a plan by the reorganization committee of the First Security Deposit Corporation? Was there such a plan submitted to you * * * A. I *think* there was a printed plan.

Q. Mrs. Tallamantes, I will ask you if you exchanged your securities * * * after there had been submitted to you the plan which I just asked you about. A. I think I did, I am a little hazy about it. I have seen the plan before that * * *

Mr. Lawson: I thought counsel was going to follow that up and show us what the plan was. Now he says you have seen a plan. What is the plan? I don't know what he refers to.

The Court: You can't try his case * * * He has asked for a plan and she said 'yes.' * * *

Mr. Irwin: * * * might that question where she was asked about the plan, if she received the plan—might it be considered stricken? There are several objections that—might be interposed, that it calls for a conclusion * * * and not the best evidence * * *

The Court: When you said, 'the plan,' you are referring to any particular plan, or just a plan of reorganization?

The Witness: Just a plan of reorganization.

The Court: The objection will be overruled. Exception." [R. 658-660.]

The next record reference of appellee is R. 682-683, and refers to the witness Morse. All he testified to was that he had received a document similar to Exhibit 131. As we have seen above Exhibit 131 contains no representation concerning the First Security loaning money only on approved legal investments.

At page 3 of the Statement of Facts appellee states that "* * * in 1931 the Railway Mutual had assets aggregating $2,300,000.00." There was no evidence of any appraisement of the assets or of value of specific assets and all of the figures given as to assets were merely figures of book value. This is true as to all companies.

At page 4 appellee states that appellant Edgerton was General Manager and counsel "during the greater portion

of the existence" of the First Security. Mr. Edgerton did not become identified in any manner with the Frist Security until long after the formulation of the Plan and Agreement and exchange of securities. Representations made with respect to the nature and character of this Plan of reorganization, the securities of the depositors of the Railway Mutual exchanged for those of the First Security, occurred long before Mr. Edgerton became attorney for the company. Mr. Edgerton was not a Director of the company, had no common stock interest in it at any time and only became a minor preferred stockholder in 1939 when jointly with his wife he had 579 shares out of a total of 12,605. Mr. Edgerton did not become general manager until October 19, 1938. The time and extent of his identification with the First Security appears in our Op. Br., at pages 19-22, with supporting record pages.

At page 4 appellee states that on September 10, 1932, there was filed with the Corporation Commissioner an application for a permit on behalf of the First Security "at which time defendant stated to the Corporation Commissioner that the Railway Mutual Building and Loan Association was a completely solvent institution." The attorneys filing the document were "Haight and Trippett, by Oscar A. Trippett, Attorney for Applicant" [R. 192]. It was many months later that Mr. Edgerton on behalf of the law office of Paul Nourse acted as counsel for the First Security.

At page 5 appellee asserts that the defendants transmitted a proxy form to depositors of the Railway Mutual

and cites record page 675. This is Exhibit 187, a letter to the witness Grace Benn, dated November 15, 1932, enclosing a form, Plaintiff's Exhibit 188, which contained a proxy to the defendants Starr, Smale and Thomas. This occurred a long time before Mr. Edgerton became identified in any manner with First Security.

At page 5 appellee asserts "By obtaining depositor's voting proxy, defendants were able to keep, maintain and control the First Security, etc.," and refers to the above Exhibit 188 and record pages 622 to 625. The record citation refers to Plaintiff's Exhibit 46 [R. 618] which is the report of the accountant Campbell, containing certain schedules among which is schedule 4 [R. 622] which refers to a pledge agreement concerning certain California Federal Savings securities owned by the Investment Finance in connection with which 16,526 shares of the Investment Finance was deposited as security; of this number of shares the schedule shows 1,166 were hypothecated and assigned by the appellant Edgerton. Exhibit 46 was not admitted as evidence as to the truth of the statements contained therein [R. 620-621].

At page 6 of his brief, appellee referring to the Realty Deposit Company, a subsidiary department of the First Security, which had a two-fold purpose, *i e.,* to purchase First Security bonds at the market value similarly as other building and loan associations were doing and to sell real estate, both its own and of other concerns (Op. Br. 23), asserts that the method of operation of the Realty Deposit was suggested by Mr. Edgerton, a letter dated Jan. 2, 1934. The method used by this subsidiary de-

partment permitted a party buying real estate to turn in bonds as consideration for the real estate or when the company sold for cash it would use these funds and buy in the open market its own bonds to offset the loss usually sustained in cash transactions by the profit made through the purchase of bonds at the prevailing market price. These bonds so purchased were then sent to the Metropolitan Trust Company for cancellation thereby reducing the outstanding obligations of the First Security (Op. Br. 24). The letter does not bear out the assertion that this method was suggested by Mr. Edgerton. The letter in question was one from the law office of Paul Nourse (Mr. Edgerton's employer) and recites "From our conversation the other day, it is my understanding that *you contemplate authorizing* the Realty Deposit Company which is a subsidiary department of the First Security * * * to purchase bonds of the First Security at their market value." This concept of the Realty Deposit Company was of the management itself and not Mr. Edgerton.

At page 6 appellee refers to a real estate transaction that the appellant Edgerton had had with the First Security in keeping with the above outlined method. Among other things appellee asserts that this real estate transaction took place in *March* of 1934 and that "after holding the property for approximately one year Edgerton sold it for $4500. cash." Neither appellee's record citation nor anywhere else in the record does it appear that Mr. Edgerton ever resold this property, much less that he sold it for $4500. Appellee also asserts that Mr. Edgerton at the time was on the Board of Control of the Realty

Deposit. Appellee then reasons from the fact that the First Security furnished its bonds which it had acquired from the public for $2206.64 in connection with this transaction and that Mr. Edgerton paid in cash to the First Security $2021.29, that he thereby caused the First Security to sustain the small loss of $185.35. The record discloses that Mr. Edgerton absented himself from the meeting of the Board of Control on November 3, 1933, when it acted upon the offer he had previously made to the department manager and at a time prior to the establishment of the Realty Deposit Company [R. 635]. The matter before the Board of Control at this meeting that Mr. Edgerton absented himself from shows that he originally proposed to pay in bonds which was changed to an offer in cash. The recommendation of the manager of the department was that they accept the cash offer "and supply the bonds necessary which we will be able to do not to exceed $2000" [R. 636]. Actually the transaction was not concluded until April 24, 1934, at which time Mr. Edgerton was not a member of the Board of Control of the Realty Deposit [R. 636, 272]. The evidence shows that there was a profit of $215.37 on the part of the First Security in connection with this piece of real estate and that the sum of $215.37 was a credit item [R. 638-640].

Early in 1933 the First Security wrote to its bondholders: "Among the advantages accruing to the new company following the separation of assets will be; * * *. The rapid liquidation of repossessed properties through exchanges for bonds and a corresponding de-

crease in outstanding obligations" [R. 345, 347-348]; and shortly after the segregation of assets "now the reorganization is an accomplished fact and the assets segregated, your company is better prepared to appraise its assets and outstanding obligations * * *. * * * we expect to find ourselves in a position to present a plan for the exchanging of properties for bonds to all those who care to take advantage of such arrangement. Every courtesy will be extended investors to help them select suitable properties * * * a real estate committee was recently appointed and a vigorous campaign is now being carried on for the disposal of these properties which will materially reduce the tax drain and the expense of supervision and upkeep." [R. 358, 359, 360.]

The above real estate transaction is the only one Mr. Edgerton had with the company. At best it is but an isolated transaction not within the allegation of the indictment and constitutes no proof of the charge. The indictment alleges that the defendants "under the pretense of loans, * * * did convert and divert to their own use * * * money and property of the * * * First Security." This transaction was as we have seen no different than other transactions between the First Security and the public.

At page 7 Appellee quotes from a letter of June 30, 1934 to the Corporation Commissioner, signed by Mr. Edgerton, as attorney for the First Security. This is a five page letter. Appellee quotes the sentence: "The company does not resell any of its bonds on the open market, or received on any real estate transaction, to any other

person for any price. The bonds once received by the company are immediately sent to the Metropolitan Trust Company for cancellation thereby reducing the outstanding liability of the corporation." Appellee then asserts that "Mr. Edgerton had engaged in that very kind of transaction." There is no evidence that the bonds once received by the company were not sent to the Metropolitan Trust for cancellation. At best the matter of bonds involved in this single isolated real estate transaction of Mr. Edgerton's with the First Security Company was only a bookkeeping entry on the books of that company [R. 638]. As stated there is no evidence that the First Security bonds as acquired were *not* sent in for cancellation to the Metropolitan Trust Company in accordance with the above letter of Mr. Edgerton's. The above quoted sentences are immediately followed by a long paragraph reciting up until two months previous transactions were "entered into whereby money might be received by one party, bonds from another, and a deed put into escrow from the corporation, the money going to the party selling the bonds, the deed going to the party putting up the cash and the bonds coming to the corporation. * * * Upon the recommendation of H. Dean Campbell, C. P. A., and this law firm, this practice was discontinued by the corporation. At the present time, therefore, as stated above, the only methods by which bonds reach the corporation is by direct purchase from stock brokers on Spring Street and when once purchased they are immediately cancelled by the Metropolitan Trust Company. The company has never made it a policy of

selling its own bonds at any profit. * * *" [R. 321-322]. There is no proof that the policy of the company in this regard was contrary to the above statement to the Corporation Commissioner.

At page 8, Appellee referring to the liquidation of the Reed Brothers Mortuary trust deed, which was consummated by March 26, 1934 [R. 499], asserts, "Finally Edgerton approached Reed and suggested that if Reed could raise $22,000.00 he could refinance his trust deed through the R. F. D. Discount Company," and cites record page 502. *The record is just to the contrary* [R. 503].

At pages 8 and 9 of his brief appellee deals with Reed Brothers—R. F. D. escrow which resulted in the R. F. D. receiving $4,200.00, out of which sum Mr. Edgerton received $1,000.00 in fees for legal services rendered R. F. D. (Appellee's Br. 32). In connection with this transaction $47,744.47 of bonds of the First Security were surrendered for cancellation to obtain the reconveyance of the Reed Brothers Mortuary trust deed, which had been in default for many months both as to principal and interest. The amount due on this trust deed was $43,-938.38. The R. F. D. had entered into an agreement with the Reed Brothers Mortuary which recited that it was in a position to exchange bonds of the First Security for a reconveyance of the Reed Brothers deed of trust and agreed to cause this to be done; the Reed Brothers agreed to pay $22,000.00 into escrow which was to be disbursed to the R. F. D. upon a reconveyance of said deed of trust. Thereafter the R. F. D. made an offer

to First Security of $17,800 cash for the Reed loan [R. 473 *et seq.*]. In connection with this transaction First Security supplied a portion of the bonds and the stockholders of the R. F. D. the remainder [R. 545-546, 242]. Subsequently the bonds supplied by the R. F. D. stockholders were replaced by other bonds of the First Security [R. 546]. Appellee is inaccurate when he says that all of these bonds were supplied by the First Security. This transaction occurred in 1934. During 1934 the First Security acquired upwards of $400,000.00 of its bonds at an average rate of 34% of their face value. The actual cost of the $47,744.47 of bonds to the First Security was $15,133.10 [R. 529]. These bonds deposited with the Metropolitan Trust were cancelled, thereby reducing the obligations of the First Security by $47,744.47. The cash price received for the $43,938.38 trust deed represented a cash profit of about $2,800.00 to the First Security plus a bond profit of the difference between $43,938.38 and $47,744.47. Appellee is entirely inaccurate in his statement that the First Security sustained the loss of $26,000.00. The only question of impropriety is the receipt by the R. F. D. of $4,200.00 for developing and negotiating the deal and in supplying only a portion of the bonds used to make up the required amount of bonds at the ratio of 10% in excess of the book value of the asset withdrawn. This is the only single transaction of its kind in the record. It is an isolated transaction. The charge here is, of course, not the question of the impropriety of this transaction, but whether or not "the defendants * * *

under the pretense of loans, * * * did convert and divert to their own use * * * money and property of the First Security."

At page 9 Appellee asserts without any record citation that "The $3,200.00 received by the R. F. D. was divided among ten persons including Appellant Edgerton and certain other defendants as a stock credit in the R. F. D. The $3,200.00 was then deposited in a bank to the account of the R. F. D. Discount Company. It was the working capital in cash of that company." There was no proof that the $3,200.00 realized by the R. F. D. Discount Company in this transaction was its cash working capital or that the $3,200.00 was divided among certain persons including Mr. Edgerton "as a stock credit in the R. F. D." The record discloses that the ten incorporators of the R. F. D. applied for permit on March 22, 1934 to issue to each of them respectively certain amounts of stock of the R. F. D. in exchange for certain securities and/or securities and cash [R. 846]. In the instance of the defendant Starr, he subscribed for 7,500 shares of R. F. D. in exchange for certain shares of stock and securities. The escrow holder under the permit reported to the Corporation Commissioner on July 20, 1934, that he held for Mr. Starr 7,500 shares of R. F. D. stock [R. 242-243]; for these shares of R. F. D. stock Starr had exchanged other specifically named stocks and securities [R. 847]. The same situation existed with respect to the other incorporators, who subscribed for 7,500 shares of R. F. D. stock for which they paid for in full with the stocks

and securities they held in other companies. As to the defendant Ireland, he subscribed for 7,500 shares and exchanged therefor stock and securities in the First Security for all but 112 shares; his subscription provided for $112.00 cash for the balance [R. 847]. The report of the escrow holder shows as of July 20, 1934, 7,500 shares in his name or that of himself and a joint tenant [R. 242]. In the instance of Mr. Edgerton's subscription he was to receive 151 shares of R. F. D. stock in exchange for certain stock and securities and 520 shares of R. F. D. for services rendered the R. F. D. and the balance was to be paid in cash. The escrow holder reports that as of July 20, 1934 Mr. Edgerton and his wife as joint tenants had only 991 shares [R. 848, 242]. The record is silent as to how this slight increase from 671 shares of stock in the R. F. D. was paid for. As to the amount of cash received by the R. F. D. at the rate of $1.00 per share the record is also silent. The aggregate shares of R. F. D. issued and outstanding as of July 20, 1934 was 33,566, according to the escrow holder's report to the Corporation Commissioner; as of November 5, 1935, 34,787 and on March 10, 1936, 35,957. Of this later amount there was an aggregate of 1,666 shares in the name of the Appellant Edgerton and/or his wife [R. 242-244]:

Next Appellee states at pages 9 and 10 of his brief: "Subsequently in December of 1936 the R. F. D. Discount Company was dissolved and its assets, which consisted of the defendant's First Security Deposit Corporation holdings—which had been bought at a discount from the

public and had been converted by defendants in R. F. D. stock at 100%—were sold in 1937 to Investment Finance Company for $36,000.00 cash on the same basis, thus permitting defendants as R. F. D. stockholders to obtain full face value for their First Security Deposit stock and bonds while other holders thereof were being asked to sell at a discount [R. 161, R. 547-567; Plaintiff's Exhibit 36]." The above constitutes a gross misstatement of fact. The assets at the time the R. F. D. was dissolved did not consist exclusively of First Security Discount Corporation holdings [R. 550]. Likewise there is no evidence that the defendants bought any of their holdings in the First Security, which were exchanged for stock in the R. F. D., at a discount from the public [R. 847]. The evidence is that the defendants, with the exception of Appellant Edgerton had long been officers and directors and security holders of the First Security's predecessor, the Railway Mutual, and obviously must have purchased their securities in the Railway Mutual during its halcyon days of the nineteen twenties. As to Mr. Edgerton the evidence is that he received $151.00 of par value R. F. D. shares in exchange for collateral trust bonds and one preferred share of stock of First Security [R. 848]. The evidence with reference to the $36,000.00 paid in 1937 by the Investment Finance to the R. F. D. is that the defendants did not receive and retain this money. As the money was received by the R. F. D., it paid the same to the various stockholders on a *pro rata* basis, the distribution being "Upon dissolution at rate of $1.00 per share", this money in turn was re-

transferred to the Investment Finance Company and deposited to its account. The appellee Edgerton received a check in the amount of $1,666.00 from the R. F. D. and endorsed the same over to the Investment Finance Company [R. 143-156, 149]. The ultimate net result of this transaction was that the Investment Finance kept its cash and acquired all of the assets of the R. F. D.

Out of the many thousands of shares of stock of the First Security the Appellant Edgerton had none until 1939 and then only 579 shares [R. 281, 285, 286].

Appellee again refers to the sale of the R. F. D. assets to the Investment Finance at page 11 of his brief, asserting that the monies paid for the assets "represented a profit" to the defendants and cites record page 143. As we have seen this money did not represent a profit to the defendants and appellee's record citation only refers to the stipulation that the $36,000.00 paid by the Investment Finance for the assets of the R. F. D., was "in turn retransferred to the Investment Finance Company and deposited in the account of the Investment Finance Company." Counsel then asserts at page 11 that the defendants used their share of the $36,000.00 to acquire stock in the Investment Finance Company citing record page 143. Although this record citation does not support appellee's statement there is evidence that the stock register of the Investment Finance Company reflected stock issued in the names of several stockholders of the R. F. D. in amounts of approximately the equivalent of the amounts of the checks transferred to the Investment Finance (in 1937) and that the stock was issued shortly after such transfer of the checks (Op. Br. 44). Appellee asserts also at page 11 that during the period of the corporate

existence of the Investment Finance, the First Security loans of cash and assets to the Investment Finance was $450,946.39, of which a balance was due after repayments of approximately $250,000.00 as of March, 1940; also that as of August 18, 1937, and thereafter, of 31,398 shares outstanding of the Investment Finance there stood in the defendants' names an aggregate of 20,791 and of this aggregate amount 2,109 shares stood in the name of the Appellant Edgerton. The loans to the Investment Finance Company of money and assets in book value had reached approximately its high point at a time when the First Security was the sole owner of outstanding stock of the Investment Finance Company (Op. Br. 28-29). The original plan and agreement authorized changes and departures therefrom in doing business; the powers granted authorized the organization of new companies, participation therein by the First Security and permitted the First Security to alter and change its method of doing business (Op. Br. 10-13). *That such powers existed is not challenged by the appellee.* There is no evidence whatever that the Appellant Edgerton, or any other defendant, profited by reason of any stock interest in the Investment Finance or that any of the funds of the Investment Finance were diverted to the defendants (Op. Br. 32). Upon dissolution of the Investment Finance Company in August of 1940 all of the assets of the Investment Finance were transferred to the First Security. The assets so transferred were "$266,723.76" (Op. Br. 27). The ultimate net results of the defendants' stock interest in Investment Finance was just zero. Appellee complains that what was wrong about this situation lay in the fact the defendants stood in the theoretical position after August, 1937, to participate in the profits, if any, of the

Investment Finance. This, however, is not the offense charged in the indictment.

On page 12 appellee states that the defendants through the Investment Finance Company represented to security holders of the First Security that it was organized for the purpose of liquidating the assets it received from the Railway Mutual. By implication Appellee concedes our position that no representation was made to the security holders of the Railway Mutual that the First Security was organized for any such purpose as charged in the indictment (Appellee's Br. 2). The allegation in the indictment to which appellee apparently addresses himself at pages 12 to 14 of his brief is one that charges that the defendants *falsely* "at all times represented * * * that First Security * * * was organized for the purpose of * * * and actively engaged in the liquidation of the said assets received by it from the Railway Mutual" (Gov. Br. 2). References to liquidation occurred many years after exchange of securities had taken place between Railway Mutual and First Security (Op. Br. 38, 70); and even though a representation was made that the First Security was organized for the purpose of liquidating the assets received by it from the Railway Mutual approximately six years after the Plan, Agreement and Declaration of Trust had been executed is unimportant. It is not a question of whether representation was made that it was organized for any such purpose, but whether or not they *falsely* represented that they had been actually engaged in liquidating these assets. The appellee offered no evidence whatsoever that the First Security was not engaged in liquidating these assets. The evidence discloses that progressively over the years these assets were being and had been liquidated (Op. Br. 40-41, 24).

The representations made regarding liquidation alluded to by appellee were those made by the acquitted defendant, Charles L. Cronk. Of the total amount of $1,599,643.33 book value of assets transferred from the Railway Mutual to the First Security title to $1,425,264.39 of these assets was vested in the Metropolitan Trust Company under the Plan of Reorganization (Appellee's Br. 24). The Trust Agreement provided that an asset in the Trust Agreement could only be withdrawn therefrom when bonds were surrendered for cancellation in an amount of 10% in excess of the book value of the asset [R. 505, 182]. The appellee does not challenge that most of the obligations of the First Security had been retired, and that most of the assets of the trust had been liquidated at the time Mr. Cronk was employed in July, 1937. The charge, of course, is one of defrauding investors out of their money and property by means of false and fraudulent representations. The representations regarding liquidation were made only in connection with inducing holders of securities of the First Security to sell the same to the Investment Finance. There was no evidence that any security holder was defrauded by reason of such representation. The plaintiff utterly failed to show that any of the securities so acquired by the Investment Finance during the period that the representation was currently made were ever acquired at less than market price. What evidence there was on the subject of market price showed that these securities were acquired by the Investment Finance at not less than the market price (Op. Br. 36-38).

Appellee at page 13 of his brief sets forth a series of representations which he classifies as "other misrepresentations". The first is: "Probably by holding the bonds until 1942 when they would become payable, that possibly

we wouldn't be able to realize the amount of the bonds" [R. 684]. This is lifted from the testimony of witness Morse who testified the acquitted defendant Cronk made this oral statement to him. This, of course, is nothing but the expression of an opinion. The conversation in which the above quoted statement was made occurred in the summer of 1937 [R. 683-684]. This witness on maturity received the full face value and interest of his bonds from the First Security [R. 695-696]. Second: that "such amount of the assets have been deposited to the extent that the income has been cut down where it is insufficient to meet the monthly operating overhead." The word "deposited" in the quoted sentence should read "disposed" [R. 707]. This is a communication from the Investment Finance Company by Mr. Cronk to the witness Biddleman, dated July 27, 1938 [R. 705]. The above is a portion of a sentence; what Mr. Cronk did state was that the above was his "understanding" [R. 707]. What Mr. Cronk said was: "In my opinion, the thing for you to decide is whether it would be to your advantage to cash these bonds at eighty cents or wait that length of time with the chance of realizing any more out of what is left of the assets after more than one million dollars worth of assets has been liquidated. It is my understanding further that such an amount of the assets, (then continues above quoted portion)." There was no evidence that the assets had not been disposed of in such an amount that the income had been cut down where it was insufficient to meet the monthly operating overhead. Neither is it charged as a false representation. Appellee merely asserts that this as well as the foregoing representation was false without showing wherein it was false. This witness sold his bonds which

were due in 1942 to the Investment Finance Company at 80¢ on the dollar in October, 1938 [R. 706-707]. Bidelman testified that he "took the matter of the sale of his securities (under consideration) for two or three months" when Mr. Cronk approached him and discussed the sale of his securities. He told Mr. Cronk, "I don't do business that way. * * * I get it through the banks * * *" [R. 718]; that he only "discussed the matter" with "the banks" * * * "I took it up with the bank in Little Falls" [R. 716]. Third: That "You can obtain $830.25 for your bonds now or wait approximately six and a half years and take your chances on obtaining more out of what is left of the assets after $900,000. has already been liquidated." This is a letter of the Investment Finance Company, by Cronk, to the witness Taylor, in January 1938 [R. 801]. The offer related to two bonds in the face amount of $1186.06. In October of 1938 he sold these bonds to the Investment Finance Company for $1008.16 [R. 800]. There was no evidence whatever in the record that as of January 1938, $900,000. of the assets had not already been liquidated. As of January 1938 these bonds, which had a face maturity date of Nov. 1st, 1942 also had an 18 months extension clause which would permit maturity date to be extended to May 1st, 1944 [R. 800, 231, 335]. Fourth: That "They were (First Security Deposit) in a bad condition and practically on the verge of bankruptcy and that the securities were not worth a lot of money." This is an excerpt from a sentence of the testimony of witness Walker. The remainder of the sentence

was "* * * but they could take care of them at some kind of a price for us, and he stated a price that didn't satisfy us; so we didn't sell the bonds. The price he offered us at that time was less than 80 cents on the dollars." He attributes the foregoing statement to the defendant Twombly. This conversation occurred in May or June of 1937 [R. 744]. In October of 1938 he was paid 85¢ on the dollar for his two bonds aggregating $813.21 by Mr. Cronk [R. 748, 744]. There is no charge in the Indictment that the defendants falsely represented that the First Security was on the verge of bankruptcy. The fact is that there was no proof of knowledge on the part of the appellant Edgerton or any of the other defendants that this or any of the so-called "other misrepresentations" were ever made by the acquitted defendant Cronk or Twombly. Fifth: That "inasmuch as the company is right on the verge of a breakdown". This also is an excerpt from the testimony of the witness Walker, who testified he had another conversation with the defendant Twombly in the middle of 1937, in which Twombly said "at that time he told us practically the same thing as in the first conversation; that things were looking bad; he told us that inasmuch as the company was right on the verge of a breakdown, or he told us that he could give us around what he offered us before, may be a $1.00 or more: he says 'That is about all, we can't give you any more than that.' We did not accept the offer." Also appellee states "That the Company was on the verge of a collapse." This likewise is lifted from a sentence from the same witness. The wit-

ness testified that acquitted defendant Cronk said "he told us what we were going to do about the disposing of our bonds and he told us that the company was on the verge of a collapse and he wanted to get the business straightened up for them, then he made us an offer. We did not accept the offer." None of the foregoing is charged as a false representation and there was no proof of knowledge on the part of the other defendants that any such representation was made. Sixth: That "the affairs were going through a procedure of receivership; and the affairs usually operated at a loss to the stockholder; the funds were used up by the expenses of the receivership * * *." This is an excerpt from the testimony of the witness Robertson, concerning a conversation he had with the witness Cronk. This witness testified that he sold his securities at a price of 86⅓¢ on the dollar [R. 740]. This witness further testified on Cross-Examination "Mr. Cronk didn't say it was above the listed price at that time, but it was above the price that it had been listed prior to that time;" [R. 741] * * * "He told me that that price which he offered was as good a price as he could get for my securities from any other source; I think that that was the price that was listed. I don't remember that he said it was a better price than I could get from any other source * * * However, different brokers would send me a card sometime listing what the price of it was. The price he offered me was just about the same as these brokers. I wouldn't be able to say whether the price he offered was a little bit better than the price offered by the

brokers" [R. 742]. When asked on Cross-Examination to tell everything that Mr. Cronk told him about receiverships he answered " 'You probably are familiar with receiverships, and if you are, you know something of how the funds go, that the expense of the receivership generally takes a big share of the funds.' I had had some experience; that part of Cronk's statement was a correct statement" [R. 742]. This witness had conversations with Mr. Cronk late in the fall of 1937 and August 1938 [R. 738, 743].

The appellee concludes his so-called statement of facts on page 14 with the assertion that the evidence showed that the Investment Finance Company would sell bonds it acquired at a discount to the First Security at 100% of their face value and that on these bond transactions the Investment Finance Company made a profit of approximately $63,217.24. In support of this statement he cites Record page 540. There is no evidence that the Investment Finance sold the bonds it acquired to the First Security. The evidence is that the First Security loaned money and assets at book value. The assets borrowed were trust deeds, real estate, etc., and these were charged to the account of the Investment Finance at the book value at which the First Security carried them on its books. The valuation of the assets as carried on the books of the First Security was transferred and added to the indebtedness of the Investment Finance to the First Security (Op. Br. 28). While a portion of the bonds

acquired by the Investment Finance Company at a slight discount from holders thereof and credited by the First Security at their face amount in payment of interest and indebtedness, it is inaccurate to state that thereby a profit resulted to the Investment Finance in the amount of $63,217.24. The figures cited is the difference between what the Investment Finance paid for bonds of the First Security and their total face value of $240,929.99. As a matter of fact, the so-called accrued theoretical profit of $63,217.24 was ultimately merged in the assets of the First Security by the transfer of all of the Investment Finance Company's assets to the First Security.

Appellee in his statement of facts then argues this theoretical profit of $63,217.24 accruing to the Investment Finance "was a profit by which these defendants * * * collected in full from the First Security Deposit Corporation and thereby realized huge profits for themselves personally." This is a gross inaccuracy. The evidence shows to the contrary that the defendants did not personally profit.

At pages 25 and 26 of his brief appellee states that the defendants, at the time the reorganization committee obtained consents of the Railway Mutual investors to the reorganization, had procured "enough proxies from said investors to vest in said defendants the control of said company." For the first two years the common stock represented, which was only a small issue, the voting control. The law firm of Haight and Trippet were the

authors of the "plan, agreement and declaration of trust", the consent and proxy and Exhibit 131 (the initial communication to investors regarding the proposed reorganization). Whatever action was taken as to proxies was long before Mr. Edgerton's association with the First Security (Op. Br. 19). Mr. Edgerton was not an officer or a member of the Board of Directors of the First Security. He held no proxies and did not become a stockholder until 1939, when he acquired an inconsequential number of shares [R. 285-286].

In connection with the dissolution of the Investment Finance and the transfer of all of its assets to the First Security in August, 1940 appellee asserts at page 30 of his brief, without any supporting citation of the record, that "it is undisputed that many of the items of assets transferred by Investment Finance Company to First Security were of doubtful value." This statement is definitely disputed. No evidence was offered of the value of any of these items of assets nor was there any evidence of any appraisement of any of these items. Listed in the assets transferred was a small block of preferred stock of the First Security. Even as to this item there was no evidence of its actual value, but only evidence that preferred stock of First Security had been purchased at a discount.

At page 42 of his brief appellee reiterates in substance his previous erroneous statement that Investment Finance received one hundred cents on the dollar for First Security bonds from First Security, (*supra*, p. 18).

POINT I.

Amendment of Indictment by Deleting Reference to Type of Investments Proposed. (Assignment of Error XII.)

The trial Court's action was not a mere "withdrawal" from the jury of a portion of the charges, as suggested inferentially by appellee at p. 19. The Court struck out the portion of the indictment descriptive of the type of investments proposed.

> "I have already told you that I would strike out a certain portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:
>
> '* * * theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California * * *' "

In excepting to the Court's ruling striking out these lines counsel for one defendant suggested that "the whole allegation" should be deleted, "and that it *should not be left amended.*"

The Court then stated that it was his view that the portion "could be deleted, and still the paragraph contains a *charge* proper in the indictment * * * If that couldn't have been, I would have stricken the whole paragraph." [Appendix App. Op. Br. pp. 4-5.]

Thus the Court's action modified the charge as to an element of one of the two misrepresentations charged,

i. e., the type of investments to be made. As this Court has pointed out "the very essence of the crime consists in the making of false promises." (*Barnard v. U. S.* (C. C. A. 9), 16 F. (2d) 451, 453.)

The trial court then proceeded to instruct the jury that proof of the falsity of the representation as modified would authorize a verdict of guilty (App. Op. Br. p. 64).

As this Court has further held a representation must be proved in its entirety. Proof of a portion only of a claimed representation constitutes a failure of proof (App. Op. Br. 62).

It is therefore clear that appellee is in error in asserting that the deletion "in no wise affected" the "charging part" of the indictment (pp. 17-18).

Appellee attempts to distinguish the cases relied upon by appellant by the assertion that the deletions, in those cases, went to "the very heart of the indictment" (p. 18). The fact is, however, that the deletions were of less substantive consequence or significance than the deletions made in the present case (App. Op. Br. pp. 58-60). While the amendment made by the trial court was in a material respect, the application of the rule does not depend upon the materiality of the amendment.

The cases cited by appellee have no application here. In *Salinger v. U. S.*, 272 U. S. 542, 548-9 the indictment charged "several relatively distinct plans for fleecing victims." What the Court withdrew from the jury was all of these plans but one. This was done at *defendant's* re-

quest. In *Dowdy v. U. S.*, 46 Fed. (2d) 417, 419, certain overt acts were withdrawn from the consideration of the jury. The case of *Ralston v. Cox*, 123 Fed. (2d) 196 was expressly based upon the ground of estoppel, in both the main and concurring opinions. Defendant had moved that the particular counts and overt acts be withdrawn from the jury as prejudicial to the defense. *Hartzell v. U. S.*, 72 Fed. (2d) 569, 586, involved a general instruction to the effect that "more details were alleged in the indictment than were necessary to prove."

These cases are far from holding that the Court may submit to the jury a modified charge. They merely indicate the propriety of withdrawing entire counts or overt acts, at defendant's request. An overt act does not limit, extend, or define the offense charged. Likewise a charge of one offense is not modified by the withdrawal of other charges. But the charge presented by the grand jury in the present case *was modified* by the trial court when the gist of that offense, *i. e.,* a false representation alleged was shorn of one of its elements, *i. e.,* the description of the type of investments to be made. This was a substantial and material modification, as it authorized a verdict of guilty upon proof of the making of a representation different from and falling short of the particular representation alleged.

Evidence was admited that at the time the reorganization committee was soliciting Railway Mutual investors to exchange their securities for those of First Security that they stated in a letter to depositors (Ex. 132, dated

Dec. 10, 1931) that a portion of the assets of the Railway Mutual would be converted "into a mortgage corporation enjoying all of the advantages of the mortgage companies generally" [R. 332]. Evidence was offered that on July 19, 1933, First Security sent a letter in which it was stated "on the basis of today's reduced market value of real estate, loans offer more than an ample margin of security and at attractive rates. Recovery can be speeded only by placing the company in position to attract and accept funds for investment and resuming its normal function of loaning, thereby again placing it on a profit earning basis" [R. 348, 345]. These representations were not charged in the indictment. They do not support the charge that it was falsely represented that loans would only be made on securities or property theretofore approved as legal investments by the Superintendent of Banks, etc. The above evidence might support the modified allegation that they would loan "only upon securities or property." But this is quite different than the representations alleged in the indictment.

The cases are clear, however, that the application of the rule of *ex parte Bain,* 121 U. S. 1, is not dependent upon the materiality of the modification. In the *Bain* case the deletion consisted of six words referring to the comptroller of currency; in *Stewart v. U. S.* (C. C. A. 9), 12 Fed. (2d) 524, 525, the word "feloniously" was deleted. It was nevertheless held, as it must be held here, that the indictment as modified was "no longer the indictment of the grand jury who presented it."

POINT II.

Error in Instructing Jury That Portions of Indictment Were Stricken. (Assignment of Error XIII.)

See Point I, *supra.*

POINT III.

Insufficiency of Evidence. (Assignment of Error I.)

See Point V, *Infra.*

The argument in support of points III and IV (Op. Br. p. 65) is set forth at page 65 and succeeding pages of appellant's opening brief, and the response of the government thereto is set forth commencing at page 22.

We have challenged the sufficiency of the evidence in four particulars: (a) That there is no evidence to sustain the allegation that it was *falsely* represented that the First Security would loan money only upon security on properties approved as legal investments; that (b) there is no evidence to sustain the allegation that it was falsely represented or pretended that the First Security was organized for the purpose of, and actively engaged in, the liquidation of the assets received by it from the Railway Mutual; (c) that there is no evidence to sustain the allegation that the defendants did depress and caused to be depressed the market price of the securities of the First Security; and (d) that there is no evidence to sustain the allegation that defendants did convert and divert to their own use, benefit and profit, large sums of money and property of the First Security, under the pretense of loans.

Appellee does not categorically answer our arguments under these topical headings. In fact he utterly fails to make any answer to our contention that the evidence fails to disclose that the defendants falsely represented that the First Security was actively engaged in the liquidation of the assets received by it from the Railway Mutual. Obviously he could make no answer to this contention as the evidence discloses the contrary, *i. e.,* that the First Security was actively engaged in the liquidation of the assets received by it from the Railway Mutual (Op. Br. 70). He makes no answer to our contention that the evidence fails to show that the representation with reference to liquidation, even if assumed to be false, in any wise, resulted in any security holder being defrauded. Obviously he could make no answer inasmuch as the security holders received not less than the market price (Op. Br. 71).

In answer to our contention that there was no evidence to sustain the allegation that it was falsely represented the First Security loaned money only upon securities and properties approved as legal investments, we have seen that he relies on Exhibit 131 which contains no such representation and on the testimony of the witnesses Morse [R. 682] and Talmantes [R. 659], neither of whom testified that such a representation had ever been communicated to them either orally or in writing. (See *supra*, p. 5.)

Counsel's argument on the insufficiency of the evidence consists of a reiteration of what he has set forth in his statement of facts and embodies all of his errors and misstatements as to fact.

Appellee to our contention there was no evidence to sustain the allegation that the defendants did depress and cause to be depressed the market price of the securities of the First Security makes no answer to our argument. It is no answer to say that bonds were bought at a discount from face principal value. The fact that securities were bought at a discount from face value is no proof that the market price or values was in fact depressed. The appellee made no effort to offer any evidence as to market price or value of the securities of the First Security.

Our contention that there was no evidence to sustain the allegation that the defendants converted and diverted to their own use, benefit and profit large sums of money and property of the First Security under the pretense of loans is apparently attempted to be answered by the claim that since the defendants after August, 1937, stood in the technical position as holders of the majority of the stock of the Investment Finance were in the theoretical position to participate in the profits of the Investment Finance, if any (Appellee's Br. 12). The fact that they stood in such a theoretical position is no proof of the allegation that they did convert and divert to their own personal use large sums of money and property under the pretense of loans. Appellee makes no contention that in fact any monies or properties were converted and diverted to their own use under pretense of loans. Surely the isolated small real estate transaction of Mr. Edgerton back in 1934 and the likewise isolated small transaction of the R. F. D. in

1934 in connection with the liquidation of the Reed Brothers Mortuary loan is no proof of this allegation of the indictment.

Appellee has repeatedly asserted the evidence was "overwhelming" and "ample" as to Mr. Edgerton. We pose the query: Why were other defendants acquitted or not convicted as to whom the evidence disclosed played a major role in the affairs and transactions of both companies as compared to Mr. Edgerton? Obviously there can be but one answer and that is that extraneous and collateral matters prevented Mr. Edgerton from receiving a fair and impartial trial.

After referring to certain transactions as constituting a diversion or conversion of the assets of First Security (pp. 22-46) Appellee's brief concludes on this point with the heading

> "It is not necessary that all the misrepresentations alleged in the indictment must be proven." (p. 46.)

For ought we know the jury reached a conclusion that the allegation of misrepresentation as amended by the trial court was the sole one finding support in the evidence. We cannot speculate as to whether the jury found the unamended allegation of misrepresentation had been proved as against the amended allegation of misrepresentation.

Williams v. North Carolina, 87 L. Ed. 189, 191.

But appellee has failed to refer to any evidence of *any* alleged false representation. Certainly evidence of con-

version, which appellee asserts, is established, is *not* evidence of a false representation. The *false representation* is the gist of the offense. (*Barnard v. U. S., supra.*) It is not supplied by evidence of conversion or damage.

The cases cited by appellee (p. 46) on the point of whether *all* the misrepresentations must be established are not contrary to the many cases cited by appellant holding that the proof *must fairly establish substantially the scheme and artifice pleaded* (App. Op. Br. 72-742).

Much less do the cases relied upon by appellee hold or indicate that mere proof of conversion or damage will supply the essential element of a false promise.

It is submitted that the decisions of this court and the other decisions referred to in appellant's opening brief as illustrative of the element of false representation, and of its integral character, are not to be disregarded for the mere reason, as appellee suggests, p. 47:

> "in the case at bar the false representation was a part of and in furtherance of a scheme or artifice to defraud."

Not only must there be proof of false representation, in the sense of the decided cases, but the evidence must show the making of *the* particular representation alleged and the falsity thereof. Conviction is not sustained by proof of other different false representations (App. Op. Br. 72-74).

POINT IV.

Error in Denying Motions to Dismiss for Insufficient Evidence. (Assignments of Error II to XI.)

See Points III *Supra* and V *Infra.*

POINT V.

Error in Refusal to Charge Concerning Absence of Evidence of Market Price or That Market Price Had Been Depressed. (Assignment of Error XV.)

The allegation of the indictment that defendant "did depress and caused to be depressed the market price of said securities * * *," according to appellee's contention, pp. 49-51, did not raise any material issue as to market value of the securities. It is asserted that "any proof as to market value was not material," the argument being that the "transactions were part of a scheme to defraud" and the government is only required to prove a scheme to defraud and the use of the mails pursuant thereto (pp. 50-51). It is finally asserted that the indictment need only show with reasonable certainty the existence and character of the scheme (p. 51).

It is submitted that the entire argument of appellee is wholly beside the point.

If as appellant contends the court refused a proper instruction as to proof of market price, and instead gave an erroneous one which authorized the jury to convict on a showing of mismanagement as distinguished from the charge of intentional depression of the market price, then the error is not cured in the slightest by the fact that

there may have been proof of a scheme to defraud or by the fact that the indictment might have been framed in the first instance in less specific form as to depressing the market price.

The fact remains that an element of the scheme as *alleged* was the depression of the market price.

During the course of the trial the court referred to this portion of the charge as "an important allegation" and referred to depressing the market price as "a necessary phase of proof" and as the first of two elements which "have got to be proven" (App. Op. Br. 87).

The prosecution having rested without presenting any proof of depressing the market price, the trial court completely reversed his position by instructing the jury in such a manner as to obviate this defect of proof, and to authorize a verdict of conviction upon a conjecture that a higher price would have been obtainable except for defendants' "activities." The court thus authorized the jury to convict upon an issue extending far beyond the specific charge of the indictment that defendants had depressed the market price.

It is submitted that appellee's brief is in reality a confession of the validity of appellant's contentions on this point (App. Op. Br. 83-87).

POINT VI.

Error in Admitting the Twombly Statement, Wholly Exculpatory as to Defendant Twombly and Inculpatory as to This Appellant. (Assignment of Error XXXIX.)

The Twombly statement, as we have shown, was a laborious collation of every transaction or happening, occurring over a period of several years, which the declarant could paint or characterize in such a manner as to reflect unfavorably upon appellant Edgerton (App. Op. Br. 90-96).

The date of preparation of the statement was not shown. It was first communicated by defendant Twombly when he delivered it to a post office inspector more than a year after his "disassociation" from defendants (App. Op. Br. 97).

Inexplicably the trial court instructed the jury that the "statement was made", as a presumption of law, "upon the last day that he was connected with the companies, to wit December 21, 1938" (App. Op. Br. 97). There was no further identification of date or surrounding circumstances.

It is important to note the purpose for which this particular harangue was admitted. It was *not* admitted for the purposes stated in appellee's brief, "(1) As an admission against interest on the part of the defendant Twombly; and (2) To show his joining the scheme or enterprise and as to him the existence of a scheme or enterprise."

The foregoing is evidently based upon the *purpose as stated by counsel,* but this was *not the purpose* for which the trial judge admitted the harrangue or for which he submitted it to the jury.

> (It may be noted at this point that the document was not in fact an "admission" against interest and likewise it was not substantive evidence to "show his joining the scheme" or the "existence of the scheme.")

The Purposes for Which the Twombly Statement Was Admitted.

The trial court instructed the jury in his only statement to them before the document was read to them.

> "We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, *as against any defendant in this court room,* including the Defendant Twombly, *except to show his intent in connection with the crimes charged.* It is expressly limited to that" [Appendix App. Br. 20].

In his formal instructions to the jury the court instructed that the document was "for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved" [R. 1031].

It is clear therefore that the court did not allow the evidence as an admission against Defendant Twombly or as substantive evidence against him—but rather as evidence

of *intent* only, and not the intent of defendant Twombly only, but the *intent of all defendants.*

The Court's error in this regard was accentuated by an instruction which required the jury to determine whether or not the defendant Twombly believed the said statements were true or false when made, and also, to decide whether or not the information thus received if it was in truth and in fact received prior to his disassociating himself from said defendants and said companies (the Court had already instructed the jury that such was a presumption of law), and thus construed by said defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies.

The Court thus inexplicably placed in issue before the jury, the truth or falsity of these entirely collateral charges and gave them substantive force in themselves as matters to be considered by the jury as actuating Twombly in disassociating himself from defendants.

With this emphasis upon the Twombly statement it is evident that the ordinary jury would find it impossible, even if properly instructed, to eradicate from their minds the impression necessarily conveyed by the Twombly charges.

Appellee has cited no case which furnishes any precedent whatsoever for the action taken by the trial court.

In the case of *Latses v. U. S.*, 45 F. (2d) (C. C. A. 10), P. 9, there was no showing that the evidence was prejudicial to the co-defendant.

In *Glasser v. United States,* 315 U. S. 60, 86 L. Ed. ....., 62 S. Ct. 629, the evidence made no reference whatever to appellant.

In *Cochran v. U. S.,* 41 F. (2d) 1932, P. 206, the statement was either read to or handed to co-defendant.

In *Kuhn v. United States,* 24 F. (2d) 910, 913 (C. C. A. 9th), the evidence consisted merely of notations of the amount of interests of defendants. The court observed that the evidence was a "delicate subject to be handled with care."

In *Kasuba v. U. S.* 3 F. (2d) 271 (C. C. A. 7th), the admission was made by the appellant himself.

In *Oras v. U. S.,* 67 F. (2d) 463, 465 (C. C. A. 9th), one defendant had stated at the time of a raid that he had given his co-defendant $700 to finance a distillery and was to be repaid by alcohol produced by the distillery.

In *Sabbatina v. U. S.,* 298 Fed. 409, 412 (C. C. A. 2), there is nothing to show any matters whatever affecting any co-defendant.

In *Fedder v. U. S.,* 257 Fed. 694, 696 (C. C. A. 9th), the judgment was reversed for failure to charge that the evidence was not admissible against a co-conspirator.

In *Mitchell v. U. S.,* 23 F. (2d) 260, 262 (C. C. A. 9th), there is nothing in the opinion to indicate the nature of the evidence.

In *Gwinn v. U. S.,* 294, Fed. 878, 879, 880 (C. C. A. 5th), the testimony was that one defendant after arrest asked the witness to tell appellant he had received certain checks from a third party.

No Other Cases Are Cited by Appellee.

In none of the cases cited is the factual situation at all similar to that here presented.

Appellee has wholly failed to answer appellant's contention that the accusatory statement was not admissible even against the declarant himself.

We have shown that as evidence of intent (which was the limited purpose for which it was admitted, except as later broadened by the Court) it was inadmissible because *not a contemporary* statement of a present state of mind under inquiry (App. Op. Br. 98-100, 106). *This point is entirely ignored by appellee.*

Appellee has also failed to answer appellant's contention that if any portions of the 17 page accusatory statement are admissible—and there are none—then only such portions should have been introduced and not the entire series of charges (App. Op. Br. 104).

We have collected in the opening brief a large number of decisions of the Supreme Court, of this Circuit and other circuits, as well as the California courts condemning the admission of accusatory statements and holding that under circumstances much less vicious than those existing here, it cannot be assumed that any purported limitation of the evidence will assure a fair trial (pp. 100-112).

There appears to be no instance, in the decisions, in which a jury has ever been asked to view with a degree of detached discrimination accusatory charges of such multitude or enormity.

Appellee's *sole* justification for the use of the accusatory statement is the assertion that it proves "knowledge" on the part of Twombly of the events related (p. 54).

Putting aside the determinative factor that it was *not* offered to show "knowledge" and was *not* received to show "knowledge," but rather "intent," the crucial fact remains that it *does not show knowledge at any time prior to the delivery of the statement,* which was more than 1½ years after December 21, 1938, which according to the court's instructions was the date of his disassociation from defendants (App. Op. Br. 88, 101).

The cases are clear beyond controversy that a statement is admissible only to show contemporaneously existing knowledge. It cannot point "backwards to the past." It cannot show a pre-existing knowledge or state of mind (App. Op. Br. 98-100). The "knowledge" of defendant Twombly *as of the date of the statement* 1½ years after his admitted disassociation from defendants was utterly immaterial.

It follows that there was not the slightest justification for submitting to the jury's consideration the multitudinous charges of the unsworn unsubstantiated accusatory statement.

That the trial court proceeded upon a principle directly contrary to that of the decisions (App. Op. Br. 96-112) of the Supreme Court by which courts are enjoined to avoid risk of confusion and refrain from exacting a duty upon the jurors of exercising a special degree of discrimination, is evidenced by the trial court's remarks with reference to the accusatory statement.

> "The Court: * * * Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall? * * *" [R. 785].

POINT VII.

Error in Denying the Motion for Severance Made at the Time of the Offer of the Twombly Statement. (Assignment of Error XXX.)

In our opening brief we referred to the cases of *Hale v. U. S.,* 25 Fed. (2d) 430, page 114; *People v. Buckminister,* 274 Ill. 435, 113 N. E. 713, page 115; *People v. Sweetin,* 325 Ill. 245, 156 N. E. 354, page 116, and *Randazzo v. United States,* 300 Fed. 794, page 117 (as holding that a severance should be granted where a statement or confession of one defendant refers to a co-defendant in such a manner as to "leave upon the minds of the jurors a lasting impression to his prejudice" (App. Op. Br. 114-117). *None of these cases are referred to in appellee's brief.*

Appellee makes reference to the case of *Soblouski v. United States,* 271 Fed. 294, 295 (C. C. A. 2nd), as holding that the fact the moving defendant "did not like the atmosphere created by the presence of a third defendant before the jury," is not a ground for severance. But the issue here is not one of "atmosphere." It is the question of whether the admission of the Twombly statement "in its entirety would be necessarily prejudicial" to appellant. (*Hale v. U. S.* (C. C. A. 8), 25 Fed. (2d) 430, 438-9.)

The case of *Rarrup v. U. S.,* 23 Fed. (2d) 547, 548, also referred to by appellee specifically holds that no possibility of prejudice was shown.

The remaining cases cited by appellee (p. 58) all emphasize the same point.

The trial court is called upon, in ruling upon such a motion, to exercise a legal discretion, and not an arbitrary, "let the chips fall where they may"—attitude.

As stated in *Bailey v. Taaffe,* 29 Cal. 422, 424,

> "The discretion intended—however, is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to defeat or impede the ends of substantial justice."

The answer to the question of whether such an impartial legal discretion was exercised appears from a comparison of the governing principle as enunciated by the Supreme Court with the trial court's statement in denying the motion.

The Supreme Court has said:

> "When the risk of confusion is so great as to upset the balance of advantage the evidence goes out."

The trial court stated:

> "Is it not proper to introduce the whole document regardless of where the chips may fall?" (App. Op. Br. 113-114).

POINT VIII.

Error in Denying the Motion for Mistrial. (Assignment of Error XXXI.)

See Points VI and VII *Supra.*

POINT IX.

Error in Admitting the Campbell Report. (Assignment of Error XXV.)

Appellee concedes the prejudicial character of the Campbell report, but asserts that its admission was proper to show "notice;" to show "knowledge and intent" (p. 60). The record is clear however that the report was offered and received *only upon the issue of intent* [App. to Op. Br. 41].

But the statement could only show the state of mind of the declarant *Campbell* and not that of any defendant. Only upon proof of knowledge of the report by Appellant Edgerton together with action taken by him in connection with such report, could the statement have any significance and then only as to the action taken. There was no such proof. Campbell was available and could have been produced (and subjected to cross-examination) to show what, if anything, Appellant Edgerton said or did concerning Exhibit 46 (App. Op. Br. 124).

The ruling of the trial court is directly contrary to the decision of this court in *St. Claire v. U. S.* (C. C. A. 9), 23 Fed. (2d) 76-78 (App. Op. Br. 123) *which appellee does not attempt to distinguish, and to which no reference is made.*

POINT X.

Misconduct of Plaintiff's Counsel in Stating to the Jury That the Campbell Report Was True. (Assignment of Error XXVI.)

Appellee suggests (p. 64) that the claim of misconduct in this regard is not open, for the reason that there was no request for an admonition to the jury to disregard the plaintiff's argument.

Appellee cites this court's decision in *Diggs v. U. S.*, 220 Fed. 545, 556. That case enunciates the general rule prevailing in California and is expressly based upon the California decisions. These decisions, however, establish an exception to the general rule which withdraws the present case from the operation of the rule relied upon by appellee.

In *People v. Crosby,* 17 Cal. App. 518, 526, the court, in passing upon a situation identical with that here presented, said:

> "Hence, it appears that the attention of the court was, in express terms, directed to the matter and the same assigned and designated as misconduct. True, he did not ask the court to admonish the jury, but it was not necessary to do so. The statement of the court in sustaining the objection upon the sole ground that it was leading, by implication at least, was a ruling that it was not objectionable upon other grounds, and was not misconduct. It appears, therefore, that the misconduct of the district attorney was accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act constituting the misconduct."

Here the objectionable character of counsel's argument was specifically called to the court's attention. The court, however, ruled

> "I see no impropriety in that" [Appendix of Op. Br. 45].

Finally the conduct of counsel was expressly assigned as misconduct [Appendix Op. Br. 48-49].

Appellee suggests (p. 66) that no damage resulted from counsel's commendation of the report. The assertion is inexplicable. The charges of the Campbell report were of the most serious character. They amounted in fact to a second indictment (App. Op. Br. 119-124).

The limitations referred to (pp. 66-67) as having been placed by the court upon plaintiff's counsel with reference to the issue of intent referred only to proposed reading from the report [Appendix Op. Br. 47].

But plaintiff's counsel was not content merely to read from the report. He then proceeded to argue that the report had been established as true [Appendix Op. Br. 48]. There can be no other conclusion drawn from the state of the record, except that of a conscious deliberate and successful effort on the part of plaintiff's counsel to prejudice the jury by the improper use of improper evidence.

At page 71 appellee refers to the fact that plaintiff's counsel at one point [Appendix 47] withdrew a portion of his comment. The purported withdrawal only accentuates the deliberateness of the misconduct, for counsel on the very next page [p. 48] repeated with more elaboration and emphasis the very argument he had purported to withdraw.

At page 68 appellee argues that misconduct is not prejudicial where the evidence is overwhelming. But we have seen that the prosecution's evidence was of the flimsiest sort. Point III, *supra*. In refusing to convict the defendants who were not implicated in the Twombly statement, the jury must have regarded it as such.

Appellee argues [p. 69] that the mere fact that counsel for one of the defendants had stated in his argument to the jury:

> "I have shown you there is no evidence in this case in the first place to support the charges that are made,"

authorized plaintiffs' counsel to proceed affirmatively to argue the truth of these broad charges, which should never have been placed before the jury in the first place, and the admission of which was expressly limited both by offer and ruling to the issue of *intent,* so that the issue of their truth was not before the jury; that counsel could proceed to disregard the limitations of his own offer and of the court's ruling, and to argue anew the immaterial issue of the truth or falsity of the statement, just as though the matter were properly before the jury.

It was not a matter of going outside the record as in the cases cited at pp. 70-71. Both counsel remained within the record, but plaintiff's counsel was permitted to present to the jury as established facts, a series of unsworn charges which under no conceivable circumstances could be proper for the consideration of the jury as issuable facts. (App. Op. Br. 127-8).

Furthermore, it will be noted that in all the cases cited the court took appropriate measures to assure that no prejudice would result.

POINT XI.

Misconduct of the Trial Judge in Insisting Upon Defendants Stipulating to Certain Facts. (Assignment of Error XXVII.)

Appellee suggests tentatively that there were no objections or exceptions to the remarks of the trial court. The case of *Kettenback v. U. S.* (p. 72) determined that no improper remarks were made. The case of *Marin v. U. S.* (p. 72) had reference only to the correctness of formal instructions.

This court has recently held that the rule requiring such an exception does not apply in all cases to misconduct on the part of the judge. Counsel for defendant was not required to provoke a further demonstration of the court's hostility which would inevitably react unfavorably upon his clients, in the minds of the jury. (*Williams v. U. S.* (C. C. A. 9), 93 Fed. (2d) 686, 690-691.)

The instances of the utmost impatience exhibited toward defendant's counsel were so numerous, and so unwarranted that they could not have been inadvertent. To require objection under the circumstances would be to require what at best would be but an idle act, and might well result in a further outburst of impatience and censure (App. Op. Br. 129-136).

The cases cited in the opening brief establish that "such judicial intimidation, derogatory remarks, ridicule and harassment on the part of a judge have no place in a court of justice" (App. Op. Br. 138-140).

These cases are entirely ignored in appellee's brief. In the cases cited by appellee the remarks of the court were so mild in comparison to those under review here that they fully confirm rather than limit the rule announced in the cases relied upon by appellant.

POINT XII.

Other Instances of the Court's Misconduct. (Assignment of Error XXVIII.)

All remarks under review were a continuation of the court's censure of the defendant's counsel. With reference to appellee's point that no objections were noted to the court's voluntary prejudicial remarks, there can be no pretense that the censure of the court would have been withdrawn, or even that a withdrawal if made could have erased the impression necessarily conveyed to the jury.

Counsel did present their view of the matters for which they were censured, both tactfully and without provocation. The court's ruling in each instance was adverse and an exception noted. Counsel were not required to further demonstrate to the jury the court's adverse attitude. (*Williams v. U. S.*, 93 Fed. (2d) 685, 690, 691.)

It is submitted that a review of the trial court's remarks (App. Op. Br. 141-146) bearing in mind the numerous strictures of the court discussed under Point XI shows that the trial court failed to exhibit "that attitude of disinterestedness which is the foundation of a fair and impartial trial."

POINT XIII.

Statements by the Court and Plaintiff's Counsel Concerning Matters Outside the Record. (Assignment of Error XX.)

Appellee's entire argument on this point is based upon the erroneous assumption that the witness Fred O. Morse testified that he had "received" the plan (pp. 88-89, 91). It is then concluded that he must have read it. This is an obvious non-sequitur.

But appellee has confused Exhibit 131 with Exhibit 9. It was Exhibit 9 which contained the "plan." Exhibit 131 did not contain the representation as to approved investments. The purported quotation at pages 87 and 88 is not a quotation from Exhibit 131. It appears only in Exhibit 9. Therefore there was no evidence and there can be no inference that the witness read the plan, from the mere fact that he received Exhibit 131 (App. Op. Br. 150-151). Also see *supra,* page 3.

POINT XIV.

Error in Refusing Cross-Examination as to Market Price of Securities. (Assignments of Error XXIII and XXIV.)

Appellee asserts that no exceptions were taken to the refusal of the court to permit cross-examination on the issue of market price. The appellee is in error. The objections and exceptions appear at Appendix Op. Br. pages 81, 82, 83, 86.

That the cross-examination was upon a material matter which very well might have elicited testimony favorable to the defense appears from the evidence that investigations were in fact made as to the market price and that as a result of such investigations the witnesses accepted defendant's offer (App. Op. Br. 153-156).

Appellee's final argument is that the market price was immaterial, but this ignores one of the elements of the scheme charged, *i. e.,* depression of the market price; it ignores also the element of false representation with reference to the market price which appellee asserts in other portions of its brief.

POINT XV.

Evidence of Collateral Transactions. (Assignment of Error XXXIV and XXXV.)

Appellee asserts that the evidence of collateral transactions was admissible to show intent (pp. 102-104).

It is only necessary to point out that the evidence was neither offered nor received for this purpose, but only to show a breach of the asserted promise that investments would be made only in *approved* securities.

This allegation, however, was subsequently modified by striking from the indictment the words "* * * theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California" and the same was withdrawn from the consideration of the jury (App. Op. Br. 158-159).

It is clear therefore that the motions to strike this evidence should have been granted.

Conclusion.

For each and all of the reasons set forth in our opening brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

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